

By order dated March 20, 1998, the Appeals Board remanded this proceeding to the Administrative Law Judge to determine the nature and extent of claimant's injury and disability. By Award dated April 3, 1998, the judge determined that claimant was entitled to receive permanent partial disability general benefits based upon his functional impairment rating. Claimant contends the judge erred in failing to find that claimant has sustained a work disability.

The only issue on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds that the Award should be affirmed.

(1) James Baskin fell and injured his right shoulder while working for the City of Junction City on May 19, 1993. Due to both the injury and a scheduled vacation, Mr. Baskin was off work from June 2 until June 14, 1993.

(2) Ronald Mace, M.D., treated Mr. Baskin's shoulder injury and released him to return to work without restrictions as of June 14, 1993. Rather than return to his trash collection job, Mr. Baskin elected to immediately retire.

(3) In May 1995, almost two years after he retired, Mr. Baskin obtained his first set of permanent medical restrictions when, at his attorney's request, he consulted with P. Brent Koprivica, M.D. Dr. Koprivica believes Mr. Baskin has a 6 percent whole body functional impairment due to the right shoulder injury and that Mr. Baskin should avoid repetitive activities above shoulder level with the right arm and repetitive pushing and pulling at the right shoulder girdle.

(4) At the request of the Division of Workers Compensation, orthopedic surgeon, Dale E. Darnell, M.D., evaluated Mr. Baskin in April 1996. Dr. Darnell believes Mr. Baskin has a five percent functional impairment to the right upper extremity and that he should avoid activities that cause him to lift his shoulder in a forward flexed position, and activities that require a combination of abduction and external rotation. Further, Mr. Baskin should not lift above shoulder level.

(5) Mr. Baskin contends that he retired because of the shoulder injury as he felt he could no longer perform his job. But the Appeals Board is not persuaded. First, in June 1993 when he elected to retire, Mr. Baskin was free of medical restrictions and limitations and he had already obtained employment elsewhere. Second, after he left the City, he worked for several other employers performing tasks, which he admitted, were heavier and more physical than his former sanitation job.

(6) Likewise, the Appeals Board is not persuaded that the medical restrictions placed upon Mr. Baskin by Dr. Koprivica in May 1995 are related to the May 1993 accident. First, the physician most familiar with Mr. Baskin's condition in June 1993, Dr. Mace, did not believe that medical restrictions were appropriate at that time. Second, as indicated above, after June 1993 Mr. Baskin worked for several other employers performing work more physical and strenuous than he performed for the City.

CONCLUSIONS OF LAW

(1) Because his is an "unscheduled" injury, Mr. Baskin's entitlement to permanent partial general disability benefits is governed by K.S.A. 1992 Supp. 44-510e, which provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.

But that statute, however, must be read in light of Foulk.¹ In that case, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered.

(2) As indicated in the findings above, Mr. Baskin has failed to prove that he terminated his employment with the City of Junction City as a result of the shoulder injury. In fact, Mr. Baskin displayed the ability to perform his job with the City when he later worked for other companies performing even more strenuous duties.

(3) Under these facts, Mr. Baskin's permanent partial general disability should be limited to the functional impairment. At oral argument before the Appeals Board, the parties stipulated that the permanent partial general disability benefits ordered in the April 3, 1998 Award were appropriate if the Board determined that Mr. Baskin's permanent partial general disability benefits were limited to the functional impairment. Therefore, the Award should be affirmed.

AWARD

WHEREFORE, the Appeals Board affirms the April 3, 1998 Award entered by Administrative Law Judge Bryce D. Benedict.

¹Foulk v Colonial Terrace, 20 Kan App 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan 1091 (1995).

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Seth G. Valerius, Topeka, KS
Karen D. Pendland, Kansas City, MO
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director